In The Senate of the United States

Sitting as a Court of Impeachment

In re:	)
Impeachment of G. Thomas Porteous, Jr.,	)
United States District Judge for the	)
Eastern District of Louisiana	)
	)

HOUSE OF REPRESENTATIVES' OPPOSITION TO
JUDGE G. THOMAS PORTEOUS, JR.'S
MOTION FOR CONTINUANCE

The House of Representatives (the "House"), through its Managers and counsel, respectfully opposes Judge G. Thomas Porteous, Jr.'s Motion for a Continuance.[1] In support of this opposition, the House respectfully submits:

I. OVERVIEW

Judge Porteous is once again "gaming" the system in order to delay and derail the proceedings as much as possible. The fact is that Judge Porteous and his counsel were put on notice in October of 2009 that there appeared to be a conflict of interest because Mr. Westling was representing both the Marcottes and the Judge. Mr. Westling concluded that a "firewall" would solve the matter and designated Mr. Remy Starns to handle the Marcotte related-aspects of the proceedings. We note that Mr. Starns appeared in the House proceedings and has been listed as counsel on every pleading filed

[1] It does not appear Judge Porteous's motion is contemplated by the June 10, 2010 letter sent by Derron Parks to counsel. That letter indicated that counsel was authorized to file any "application to modify the Scheduling Order as it relates to the June 15, 2010 motions deadline" by close of business on Friday, June 11. The House in this pleading addresses the request for a continuance of the trial date. As a courtesy to counsel, the House would not object to a brief continuance for filing motions so long as it would not inconvenience the Senate Committee or require a postponement of the trial.

in this matter.[2] There is no reason why Mr. Starns should not be held to the role he has been playing: counsel to Judge Porteous on matters relating to the Marcottes.

If Mr. Starns's role was just window dressing, then it is overwhelmingly clear that Judge Porteous sat back for over seven months without resolving the conflict and is now "sandbagging" the process by bringing in new counsel and demanding months of delay. It is the same tactic he used in the Fifth Circuit by seeking continuances on two separate occasions on the grounds that he lacked counsel, or that counsel needed additional time. This conduct should not be rewarded by giving Judge Porteous the delay he seeks. If new counsel are coming into the case, they should take the case "as is," with the trial date intact.

II. JUDGE PORTEOUS HAS BEEN ON NOTICE THAT HE WOULD NEED TO OBTAIN NEW COUNSEL TO ADDRESS THE MARCOTTE ALLEGATIONS SINCE OCTOBER 29, 2009

On October 29, 2009 – over seven months ago, and over nine months prior to the scheduled trial date – the House sent a letter to Judge Porteous's attorney clearly putting Judge Porteous on notice that he would need to obtain counsel other than Mr. Westling to address any Marcotte-related allegations.[3] The significance of this letter as impacting Mr. Westling's ability to represent Judge Porteous was well-understood by Judge

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[2]Under Rules 11 of the Federal Civil Rules, when an attorney signs a pleading he is certifying, inter alia, that he has read the pleading and that it is well grounded in fact.

[3]See Letter from Reps. Schiff and Goodlatte to Richard W. Westling, Esq., Oct. 29, 2009, (Attachment 1). In fact, Judge Porteous was on practical notice of the likelihood that the Marcotte-related allegations would be part of the inquiry prior to that date. On October 8, 2009, the House filed a Motion with the District Court for the Eastern District of Louisiana to obtain "Wrinkled Robe" grand jury materials which clearly related to the Marcottes. Messrs. Westling, Samuel Dalton and Remy Starns signed the opposition to the House's Motion on October 16, 2009.

Porteous and Mr. Westling and is underscored by the fact that Mr. Westling absented himself from the December 10, 2009 House Impeachment Task Force Hearing when the Marcottes testified (and at which Judge Porteous was in attendance). Indeed, Mr. Westling informed House Impeachment Task Force Staff that his co-counsel Remy Starns would handle the Marcotte allegations.[4] The House's intention to include the Marcotte-related allegations in the Articles of Impeachment was reinforced at the December 15, 2009 Task Force Hearing – at which Mr. Westling was in attendance – where a panel of Constitutional experts testified regarding the propriety of including pre-Federal Bench conduct in the Articles of Impeachment.

It would have been further apparent to Judge Porteous that the Marcotte allegations were not going away and that he would need to obtain an attorney other than Mr. Westling to address them when: (i) those allegations were included in the draft Articles of Impeachment considered by the Impeachment Task Force on January 21, 2010; (ii) the House Committee on the Judiciary voted the Articles out of Committee by unanimous vote on January 27, 2010; and, finally (iii) those Articles were approved unanimously by the House on March 13, 2010. Yet Judge Porteous still failed to obtain an attorney in addition to Mr. Westling so he could be prepared to address Article II and Article IV. The need for separate counsel was further highlighted by the House Managers' letter of April 13, 2010 in response to the request by Senate Counsel Morgan Frankel for certain information related to procedural issues, where the conflict of interest

[4]Mr. Starns in fact was present with Mr. Westling and Judge Porteous at some of the Impeachment Task Force Hearings but was not present when the Marcottes testified for reasons unknown to House counsel.

was again pointed out.[5] Yet again, Judge Porteous made no attempt to identify or procure separate counsel to address Articles II or IV (or a separate counsel to address all four of the Articles if he thought that would be a more prudent approach to his defense). As a state and Federal judge with more than 20 years experience on the bench who would have dealt with attorney conflict issues, Judge Porteous would have understood that such an unresolved issue provides the litigant leverage and power to confound a tribunal's attempts to move proceedings forward in an orderly fashion.

At the initial Senate Committee meeting on April 13, 2010, the Senate Trial Committee set forth a schedule that provided for the trial to commence August 2, 2010.

It was not until May of 2010 that Judge Porteous added Mr. Turley to his defense team. The inclusion of Mr. Turley thus occurred more than six months after the House's October 29, 2009 letter, approximately four months after the Judiciary Committee markup of the Impeachment Resolution containing the Marcotte allegations, and over two months after the Articles of Impeachment were voted by the full House. It was represented at the May 18, 2010 meeting of Senate Trial Committee staff and counsels for the parties that Mr. Turley was added to the defense team and would handle the Marcotte-related allegations, and that his inclusion as part of the defense team would not occasion any delay in the August 2 trial date, which was still more than two and a half months away.[6]

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[5]See Letter from Reps. Schiff and Goodlatte to Sens. McCaskill and Hatch, Apr. 13, 2001, at 5, fn. 5 (Attachment 2).

[6]We note by analogy that under the Speedy Trial Act that would pertain to Federal criminal trials, Judge Porteous would have been required to stand trial within 70 days of indictment. Title 18, United States Code, Section 3161(c)(1) ("[T]he trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date ... of the information or indictment.").

Now, less than two months prior to trial – Judge Porteous seeks a two month continuance of the August 2 trial date so that his new attorneys – Mr. Turley and three attorneys from Bryan Cave, a major international law firm with vast resources[7] – may get up to speed.[8] It is unknown what has happened to Mr. Starns and Mr. Dalton (who signed Judge Porteous's Answer to the Articles and are listed as counsel on Judge Porteous's motion response filed on June 4, 2010), or why, if they are still part of the defense team, they cannot handle the Marcotte-related Articles.

In light of Judge Porteous's inexcusable delay in obtaining new counsel despite being on notice of the need to do so since October 2009, his request for a continuance of the trial should be denied.

Here, as more fully discussed in the next section, not only has Judge Porteous had actual knowledge of the essential aspects of the Marcotte allegations for over 6 years – they were reported in the press in 2003 – he will have had over 5 months between the House's passage of the Impeachment Resolution and the trial on the Articles of Impeachment. Further, unlike a criminal case, Judge Porteous has the advantage of a complete discussion of the evidence in the House Report that accompanied the Impeachment Resolution, as well as discovery that is far broader than he would have received if this were a criminal case and which includes, most significantly, transcripts of testimony of the critical witnesses. (A witness's transcript would not be available in a criminal prosecution unless and until that witness were to be called at trial, in which case it would be turned over to the defense as "Jencks material." See 18 U.S.C. 3500(b) ("After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement ... of the witness in the possession of the Untied States which relates to the subject matter as to which the witness has testified.")).

[7]The Bryan Cave web site notes that the firm has over 1000 attorneys and other professionals, and 19 offices worldwide.

[8]Bluntly stated, new counsel should never have agreed to enter an appearance in this case or participate in the defense with the understanding that they would be unable to meet the dates that had already been set by the Senate Trial Committee for motions and trial. They joined the defense team fully aware of the trial date; now that they have entered they want the United States Senate to change its schedule – which for all intents and purposes requires a trial prior to the August recess so that the matter may be voted by the Senate in September – to accommodate them.

III. THE MARCOTTE ALLEGATIONS ARE STRAIGHTFORWARD AND INVOLVE MINIMAL DISCOVERY

The allegations in Article II (and by extension, Article IV) are straightforward, witness-intensive (as opposed to document-intensive) and involve minimal discovery. Article II alleges that Judge Porteous took a series of official acts for the Marcottes -- setting and splitting bonds, setting aside convictions and generally vouching for them and helping them form relationships with other state judges – and, in return, the Marcottes gave him numerous things of value, including numerous expensive lunches, one or two trips to Las Vegas, car repairs and home repairs. This course of conduct is described in detail in the House Report. The evidence relating to this Article is found in the testimony of Louis Marcotte and Lori Marcotte, the testimony of third party witnesses – which testimony has been provided to the defense – as well as certain corroborative documents that have been provided in discovery to which there is really no question of authenticity, such as the bail orders and the orders setting aside or expunging convictions. In addition, the House has marked, and has available for inspection, various credit card records and calendars of the Marcottes. In short, this is not the sort of white collar, document-intensive case involving proof of subtle financial facts that is so complicated as to demand delays in trial for preparation. To the contrary, the essentials of the allegations have been well-understood by Judge Porteous for years, and the witnesses who would shed light on this relationship are similarly well-known to Judge Porteous.[9]

[9]The House will provide new counsel with discovery on the Marcotte allegations.

Further, Judge Porteous has had practical knowledge of the Marcotte allegations since 2004,[10] was further informed of the Marcotte allegations in the DOJ complaint letter of May 18, 2007, and was present when the Marcottes testified before the House Impeachment Task Force on December 10, 2009. The allegations of judicial corruption have never changed. There is no reason that the four attorneys who are now involved could not be prepared to address the relatively few witnesses and documents associated with Articles II and IV within the existing schedule.

IV. THE SENATE SHOULD FOLLOW THE EXAMPLE OF THE FIFTH CIRCUIT, WHICH DENIED JUDGE PORTEOUS'S CONTINUANCE MOTION BASED ON HIS CLAIM THAT HE DID NOT HAVE AN ATTORNEY

In considering Judge Porteous's request for a continuance, the Senate should consider that in connection with the Fifth Circuit Hearing, Judge Porteous sought two continuances because of claimed difficulties obtaining counsel. The first of these requests was granted; the second was denied. The chronology of events associated with the Fifth Circuit Hearing provides insight into Judge Porteous's strategy in dealing with tribunals, and the Fifth Circuit's handling of this issue provides a model for the Senate Committee to follow.

On June 11, 2007, Judge Porteous's attorney at the time, Kyle D. Schonekas, Esq., who had represented Judge Porteous in connection with the criminal investigation, sent a letter to Ronald Woods – investigative counsel for the Fifth Circuit Special Committee – proposing a resolution whereby Judge Porteous would retire voluntarily

[10]As an example, we note that Judge Porteous's initial lawyer, Mr. Schonekas, was actively engaged in defending Judge Porteous from being criminally prosecuted as part of the Department of Justice's Wrinkled Robe investigation.

"with all customary retirement benefits, with the (necessary) provision that ordinary length-of-service requirements would be waived."

On June 25, 2007, in a letter to Mr. Schonekas, Chief Judge Jones, Judge Benavides and Judge Lake rejected Judge Porteous's offer, explaining that "[t]he Committee lacks authority to offer or to recommend what amounts to a preemptive settlement to Judge Porteous short of the completion of the investigation." The June 25, 2007 letter further designated August 27-29, 2007 as the Special Investigatory Committee hearing dates.

On July 2, 2007, Mr. Schoenaks sent a letter withdrawing from his representation of Judge Porteous.

On July 5, 2007, Judge Porteous wrote a letter to Chief Judge Jones requesting a continuance of the August 27 trial date "in order to allow me adequate time in which to obtain counsel and bring counsel up to date...." Judge Jones responded on July 10, 2007 and granted Judge Porteous his requested extension, re-scheduling the hearing dates to September 26 and 28, 2007.

On August 2, 2007, attorney Michael H. Ellis wrote a letter to Chief Judge Jones stating that he would "assist" Judge Porteous and requesting a second continuance of the hearing dates until after October 17, 2007. Subsequent correspondence makes reference to the fact that the Hearing was initially postponed to late September and was thereafter postponed again until October 29, 2007.

In September and October, 2007, Ron Woods provided voluminous discovery to Mr. Ellis, during which time Mr. Ellis attempted to gather materials in support of a disability retirement for Judge Porteous.

On October 12, 2007, Chief Judge Jones signed a Memorandum of Understanding that would have involved the dismissal of the complaint against Judge Porteous. This was never signed by Judge Porteous.

On October 16, 2007, Mr. Ellis withdrew as counsel for Judge Porteous. In the letter to Mr. Woods, Mr. Ellis wrote:

> Yesterday, I had a very lengthy discussion with my client, Judge Porteous, in which we reviewed the proposal you submitted to him, as well as other aspects of this inquiry. After considering those things discussed in our meeting, I feel compelled to withdraw as counsel for Judge Porteous in this matter. He and I are at an impasse with respect to the future course of my representation, which causes me to take this action. In that regard, I am writing a letter to the judge advising him of my withdrawal.

In his letter to Judge Porteous, Mr. Ellis wrote:

> After our lengthy conversation yesterday, it is glaringly apparent that we have irreconcilable differences regarding my representation of you in this matter. Friends can disagree, but it is my professional opinion that I can no longer properly represent you under these circumstances.[11]

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[11] In his email associated with his initial entry into the case, Mr. Turley noted that: "I recently learned that Judge Porteous has a retirement date of next year. It seems to me that a possible resolution is worth exploring to avoid both a trial and a problematic precedent. I do not want to waste time and effort but I was frankly surprised to find no record of any discussion of such a resolution." Email from Jonathan Turley to Derron Parks, et al, May 25, 2010. Judge Porteous's Continuance Motion repeated this same message: "Indeed, when New Counsel raised the possibility of a resolution of this matter without a trial, the House Managers declined to respond and have indicated no interest in discussing such a resolution. While the defense recognizes that Mr. Baron and his staff have made personal and professional sacrifices to be able to try this case, it would seem in neither the interest of the accused or the public to hold a trial when a resolution is possible. Since the Managers have declined discussion of such a resolution, New Counsel remains focused on assuring a fair trial for Judge Porteous." Judge G. Thomas Porteous, Jr.'s Motion for Continuance at 7, fn. 8.

On October 18, 2007, Judge Porteous wrote yet another letter to Mr. Woods, this time seeking a second continuance of the hearing dates, this time for 90 days, in light of Mr. Ellis's withdrawal.

On October 19, 2007, Mr. Woods responded to Judge Porteous's letter of October 18, and, on behalf of the Special Committee, denied the request for a continuance. From Mr. Woods's letter, it appears that the Fifth Circuit had believed they had reached an agreement with Judge Porteous as to his resignation, but that Judge Porteous had walked away from that agreement.

On October 29, 2007, at the Hearing, Judge Porteous again sought a continuance. The colloquy between Judge Porteous and two of the Judges parallels the issues in this

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Of course, as noted above, there were substantial "discussion[s] of ... a resolution" in the Fifth Circuit – notwithstanding counsel's stated "surprise" to find "no record" of them. In connection with the Fifth Circuit proceedings, Judge Porteous sought disability retirement. This was rejected by Chief Judge Jones who noted that Judge Porteous handled his case load in a manner inconsistent with his claim of disability. The reference to Judge Porteous's eligibility for retirement "next year" omits the fact that he is eligible in December of 2011 – still a year and a half away, and over four years from the date of the Fifth Circuit Hearing.

If Judge Porteous truly wanted to satisfy the public interest he should resign his Office.

Finally, in considering the equities of a possible disposition, the House notes that those who have given Judge Porteous things or taken acts to benefit Judge Porteous throughout his career have paid a profound price for their conduct. Mr. Amato and Mr. Creely have turned in their law licenses, other attorneys who have given him things have been investigated by the Bar, his secretary Rhonda Danos – who Judge Porteous used to help him hide his financial affairs in connection with his bankruptcy – has been fired, Louis Marcotte and Lori Marcotte are convicted felons (and Louis Marcotte went to jail), and Mr. Lightfoot has been investigated by the Bar. Judge Porteous's attempts to leverage the procedural difficulties of an impeachment trial to negotiate lifetime income from the United States, after having taken so much from so many, reflects much of the same sort of entitlement to wealth from others that underlies his conduct in the Articles.

case, and the reasoning of Chief Judge Jones in denying the request provides a clear example of how such arguments were considered in 2007.

> Judge Porteous: I'd like to reurge my motion to continue. I know the Court has looked at it and denied it; but I was left without counsel approximately two weeks ago, or right up in that vicinity. ...
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> I am not doing this out of some dilatory tactic; but I believe that the ends of justice in this particular case warrant a short continuance, that the government has had this particular matter for at least four years, if not longer. They've had access to the FBI agents and all the parties involved; and I would just like to reurge my motion, your Honor.
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> Mr. Woods: ... The charge itself is very detailed. He knows the allegations and the – it could not be more specific, naming what the offense is, what – the date of the offense, what document was falsified, what witness will testify to certain events. He's been notice since May the 24th of very specific allegations, and we've offered the documents as soon as we got them from the Department of Justice.
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> Judge Benavides: Mr. Woods, you refer to the May 24th date. Is that a date that the complaint was forwarded to Judge Porteous?
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> Mr. Wood: Yes, your honor.
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> Judge Benavides: So, the factual allegations have been made known with reference to the complaints since at least May the 24th?
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> Mr. Woods: Yes your Honor. And Judge Porteous was under criminal investigation by the Department of Justice, as he pointed out, for a number of years. His attorney at that time, Kyle Schonekas, appeared to be very much on top of the case, appeared at grand jury, and instructed various witness – well, one witness, Claude Lightfoot, Judge Porteous' bankruptcy counsel, not to answer certain questions. So, he was on top of the investigation, knew the allegations, and I'm sure [Schonekas] kept this counsel [Ellis] of Judge Porteous advised.
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> Judge Benavides: Is there anything with – in reference to the actual complaint that was tendered later, that wasn't the subject of – or already information contained in the complaint from the Justice Department of May 24?

Mr. Woods: No, your Honor. ...

* * *

Chief Judge Jones: All right. We're familiar with the procedures in this case and with your level of acquaintance with the issues, and we would deny the motion to continue.[12]

Just as Judge Porteous attempted to thwart the Fifth Circuit from holding the Special Committee Hearing according to its schedule, Judge Porteous has reverted to that very same pattern to defeat the orderly functioning of the Senate Committee in this case. Moreover, even after this experience with the Fifth Circuit Special Committee, in which he sought unsuccessfully to obtain a continuance by claiming that he needed counsel and that counsel would need time to prepare, Judge Porteous failed to secure proper representation for the Impeachment trial in a timely fashion and has made a request for a continuance in this case. And, just as the Fifth Circuit concluded that Judge Porteous had ample knowledge of the charges and ample opportunity to prepare a defense, so should the Senate Committee reach a similar conclusion in this case. The existing trial date should be kept.

WHEREFORE, the House requests that Judge G. Thomas Porteous, Jr.'s Motion for a Continuance be Denied.

[12]Transcript of Proceedings, In re: Complaint of Judicial Misconduct Against United States District Judge G. Thomas Porteous, Jr., Eastern District of Louisiana, Dckt. No. 07-05-351-0085 (Special Comm. for the Fifth Cir. Jud. Council) at 5-9.

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

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June 14, 2010